IN THE

UNITED STATES COURT OF APPEALS,

FIFTH CIRCUIT.

No. 15,451.

TERM 19....

CENTRAL OF GEORGIA RAILWAY COMPANY and BROTHERHOOD OF RAILROAD TRAINMEN,
Appellants and Cross-Appellees,

vs.

ODELL JONES, DOCK RUTLEDGE, A. C. CAIN, and MAJOR THREAT, et al., for and on Behalf of Themselves and Others Similarly Situated,
Appellees and Cross-Appellants.

PETITION FOR REHEARING.

To the Honorable Judges of the United States Court of Appeals for the Fifth Circuit:

The Central of Georgia Railway Company, a Corporation, the Appellant above named, presents this, its Peti-

tion for a Rehearing in the above entitled cause, and, in support thereof, respectfully shows:

I.

The cases of Steele v. L. & N. Railroad Co., 232 U. S. 192, 65 Sup. Ct. 226, 89 L. Ed. 173; Tunstall v. Brotherhood, 323 U. S. 210, 65 S. Ct. 235, 89 L. Ed. 187; Graham v. Brotherhood, 338 U. S. 232, 70 Sup. Ct. 14, 94 L. Ed. 22; Brotherhood v. Howard, 343 U. S. 768, 72 Sup. Ct. 1022, 96 L. Ed. 1283; Rolax v. A. C. L. R. R. Co., 186 Fed. 2d 473; Brotherhood v. Mitchell, 190 Fed. 2d 308, which the Court regarded as conclusive on the substantive questions of law in this case are distinguishable from the case at Bar.

II.

The cases of Steele v. L. & N. Railroad Co., 232 U. S. 192, 65 Sup. Ct. 226, 89 L. Ed. 173; Tunstall v. Brotherhood, 323 U. S. 210, 65 Sup. Ct. 235, 89 L. Ed. 187; Graham v. Brotherhood, 338 U. S. 232, 70 Sup. Ct. 14, 94 L. Ed. 22; Brotherhood v. Howard, 343 U. S. 768, 72 Sup. Ct. 1022, 96 L. Ed. 1283; Rolax v. A. C. L. R. R. Co., 186 Fed. 2d 473; Brotherhood v. Mitchell, 190 Fed. 2d 308, did not have the effect of placing the negro employees in a status of employment to which the respective railroads had not contracted that they be placed, which is the effect of the Court's affirmance of this case.

III.

The case of Brotherhood v. Mitchell, 190 Fed. 2d 303, cited by the Court in its majority opinion, is not authority for the assessment of damages against a railroad which is the result of the Court's affirmance of this case.

Wherefore, upon the foregoing grounds, it is respectfully urged that this Petition for Rehearing be granted

and that the judgment of the District Court be, upon further consideration, reversed as to the Appellant, Central of Georgia Railway Company.

JOHN B. MILLER,
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Savannah, Georgia,

W. H. SADLER, Jr.,
1314 Comer Building,
Birmingham, Alabama,

Attorneys for Petitioner and Appellant, Central of Georgia Railway Company.

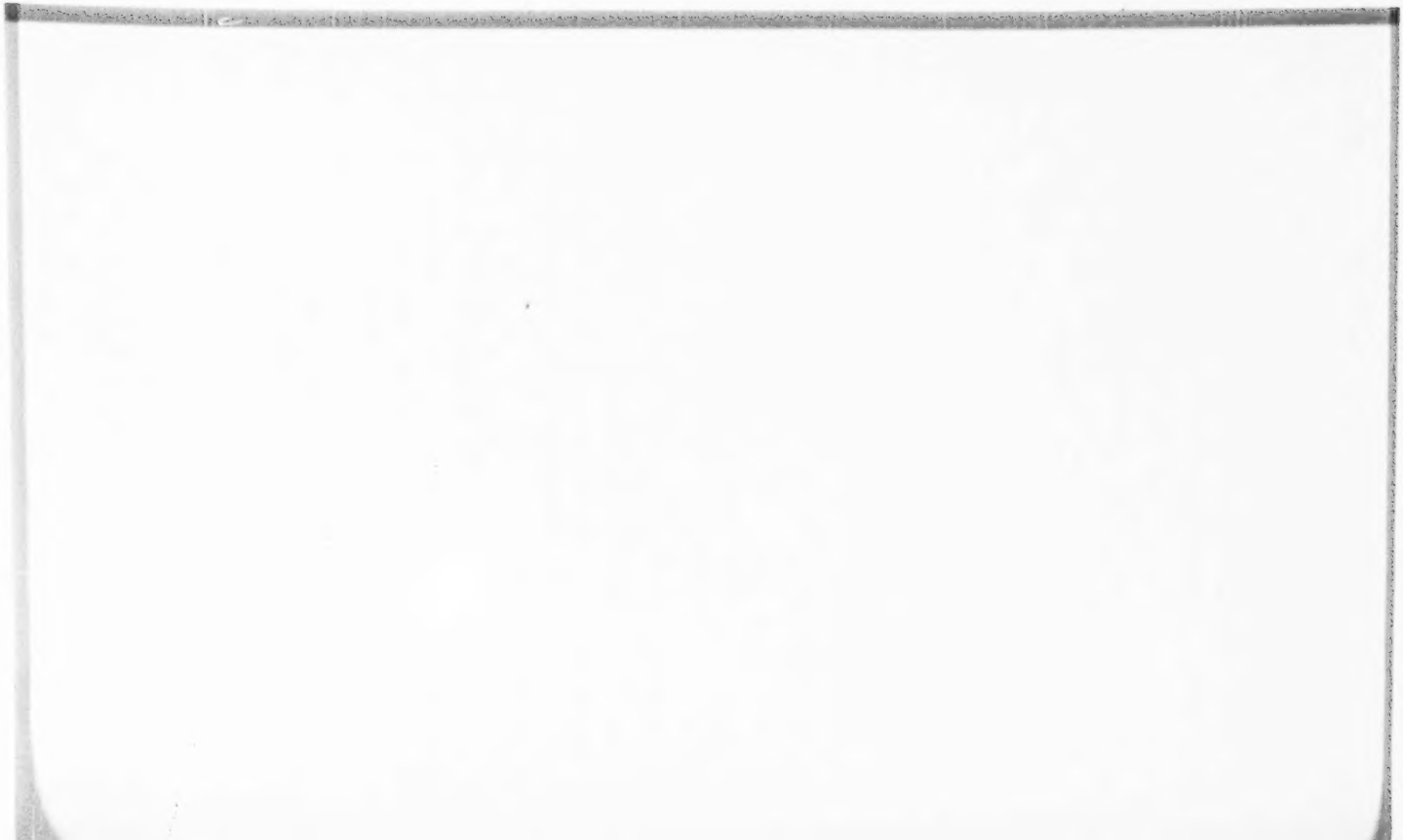
Certificate of Counsel.

I, W. H. Sadler, Jr., one of the Attorneys of Record for the Central of Georgia Railway Company, a Corporation, do hereby certify that the foregoing Petition for a Rehearing of this cause is presented in good faith and not for the purpose of delay.

I further certify that a copy of the foregoing Petition for a Rehearing has this day been served on Messrs. Cooper, Mitch and Black, 1329 Brown-Marx Building, Birmingham, Alabama, Attorneys for Appellees Odell Jones et al., and upon Messrs. Jackson, Rives, Pettus & Peterson, Massey Building, Birmingham, Alabama, Attorneys for Appellant Brotherhood of Railroad Trainmen.

This ..... day of February, 1956.

.....
W. H. Sadler, Jr.



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Appellees and Cross-Appellants.

BRIEF AND ARGUMENT IN SUPPORT OF APPLICATION FOR REHEARING BY APPELLANT CENTRAL OF GEORGIA RAILWAY COMPANY.

May It Please the Court:

Points One and Two of Petition for Rehearing.

Points One and Two of this Petition are so closely applied or connected that for the sake of brevity and coherency they will be discussed together.

The majority opinion takes the position that all of the substantive questions in this case have been foreclosed by the cases of Steele v. L. & N. Railroad Co., 232 U. S. 192,

65 Sup. Ct. 226, 89 L. Ed. 173; Tunstall v. Brotherhood, 323 U. S. 210, 65 Sup. Ct. 235, 89 L. Ed. 187; Graham v. Brotherhood, 338 U. S. 232, 70 Sup. Ct. 14, 94 L. Ed. 22; Brotherhood v. Howard, 343 U. S. 768, 72 Sup. Ct. 1022, 96 L. Ed. 1283; Rolax v. A. C. L. Railroad Co., 186 Fed. 2d 473; Brotherhood v. Mitchell, 190 Fed. 2d 308. That this is an incorrect ruling by the Court is argued with much more clarity and force by the dissenting opinion of Judge Brown than it can be by any argument of ours. Judge Brown recognizes that one of the substantive issues in this case is the assessment of damages against the Central of Georgia Railway Company, and he points out that for the Court to assess damages there must have been the violation of some duty of the Railroad Company. The railroad is being required to pay damages when it has broken no contractual obligation, has breached no common law duty and has violated no trust relationship such as exists between the Brotherhood and these appellees. The majority opinion in no way discusses this substantive point of law and we earnestly and respectfully believe that the Court erred in failing to recognize and adopt Judge Brown's comments on this issue.

The affirmance of this case will result in the creation of a new status of employment for the appellees, to which the Railroad Company has never agreed. To us, it cannot be seriously questioned but what this result constitutes an action on the part of the Court in writing a contract of employment for an employer and an employee. As we have stated before, we know of no rule of law that gives the Court this power and there is no statute by which the Congress has authorized or required that the Court do so. In fact, what the Congress has done is to require that the employment contract between this Railroad and the appellees be arrived at through the processes of collective bargaining, undertaken between the Railroad and the Brotherhood. The Railroad is powerless

to enter into a contract, except through that process, and the Railroad is further powerless to deal with any entity or group of individuals other than the Brotherhood; yet, now, we are in the position of having written for us a contract by judicial decree, which we believe violates the concept of Congress in adopting the Railway Labor Act, 45 U. S. C. A. 154, et seq., and which goes beyond the holding of the Steele case and other cases which are made the basis of the majority opinion in this case.

The result and effect of the decree in each of the cases cited by the Court in the majority opinion is to restore the negro employees to the status they held, by contract, prior to the execution of the contract, which deprived them of rights, and which was held to be discriminatory. In other words, the negro employees in the Steele and other cases were restored to a status which they had held pursuant to the terms of a contract which had been arrived at as a result of collective bargaining negotiations mandated by the terms of the Railway Labor Act. But such is not the case here. As pointed out by Judge Brown, the impact of the trial court's decree, and this Court's affirmance of the same, is to circumvent entirely the prescribed legal processes which the Congress has established for relations between a railroad company and its employees. If the Court affirms this case to the extent of declaring the discriminatory provisions void, but reverses the case as to this appellant, on the aspect of the imposition of damages and on the aspect of granting the employees job rights which they have not acquired by contract, then the Brotherhood will be under no obligation to bargain on behalf of these employees and to carry out the trust which the court has found is placed in it by the terms of the Railway Labor Act; and the right of the railroad, as an employer, to bargain for its own best interest, will remain unimpaired and unviolated. The status of the employees, as a result of that bargaining, and this Court cannot pre-

sume that the bargaining would not be carried out in good faith, would be arrived at in the manner which the Congress, by the terms of the Railway Labor Act, intended that it be done. Such a ruling by this Court would also be in complete agreement with the Steele and other cases and it would be in complete agreement with the policy of the Congress, as indicated by its failure to enact a Federal Fair Employment Practice Act. It would also recognize and reaffirm the basic legal concept that a trust placed in the Brotherhood by the Railway Labor Act does not impose a penalty on another, in whom no such trust relationship was placed, for a trust violation by the trustee.

III.

The case of Brotherhood v. Mitchell, 190 Fed. 2d 308, approves the ruling of the lower court in imposing damages on the Railway Brotherhood for sponsoring a contract discriminatory against negro firemen. In that case the trial court, we believe, in recognition of just the very points which we make here, declined to impose damages against the Railroad Company. That case, which was cited in the majority opinion, cannot be accepted as authority for the Court's ruling here. While the Court in this case might properly draw the inference that the Central of Georgia knew that the Brotherhood was not performing its statutory function properly, yet, there is no proof that any demand was ever made upon the company that the discriminatory provisions be changed or deleted from the contract of 1952. In the Mitchell case, there was proof that an actual demand was made and that for awhile the Railroad Company refused to agree, but there is also proof that ultimately it did agree to the discriminatory provisions which were the subject of that lawsuit. It seems illogical to us that the Central of Georgia should be penalized here for failing to undertake the protection of negro employees, when in the Mitchell case the Railroad was not penalized for agreeing to the discriminatory pro-

visions under issue there. Furthermore, in the Mitchell case, as well as the other cases following the Steele case, the railroads agreed to provisions which restricted contractual privileges previously accorded them, which is quite different from our agreeing to proposals made by the statutory trustee for these employees, which did not change any status which they had acquired by any prior contract which we made with the employees, either directly or through their statutory trustee.

We recognize that this case has received the mature consideration of the Court, following a reading of the record, the briefs and hearing the oral argument. In deference to the Court and in realization of the time and effort which the Court has already devoted to this case, we will not argue at length and in detail the points made in our original brief. Suffice it to say, that our position is succinctly and accurately stated in the opinion of Judge Brown, and we ask the Court that, on further consideration, Judge Brown's opinion be adopted and accepted.

Respectfully submitted,

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Birmingham, Alabama,

By: .....
W. H. SADLER, JR.

Certification of Service.

I, W. H. Sadler, Jr., one of the Attorneys of Record for the Central of Georgia Railway Company, a Corporation, do hereby certify that a copy of the foregoing Brief and

Argument in Support of the Petition for Rehearing h
this day been served on Messrs. Cooper, Mitch & Blac
1329 Brown-Marx Building, Birmingham, Alabama, A
torneys for Appellees Odell Jones et al., and upon Messr
Jackson, Rives, Pettus & Peterson, Massey Building, Bi
mingham, Alabama, Attorneys for Appellant Brotherhoo
of Railroad Trainmen.

This ..... day of February, 1956.

.....

W. H. Sadler, Jr.

JUL 3 1958
JOHN T. FEY, Clerk

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1958

No. 83

CENTRAL OF GEORGIA RAILWAY COMPANY,
Petitioner,

vs.

ODELL JONES, DOCK RUTLEDGE, A. C. CAIN, AND MAJOR THREAT, ET AL., FOR AND ON BEHALF OF THEMSELVES AND OTHERS SIMILARLY SITUATED,
Respondents

BRIEF OF RESPONDENTS ODELL JONES, ET AL. IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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